

REMARKS

The Applicants have studied the Office Action dated September 25, 2006, and have made amendments to the claims to more clearly and distinctly claim and particularly point out the subject matter which the Applicants regard as the invention. No new matter has been added. The Applicants are submitting a request for continued examination concurrently with this response. It is submitted that the application, as amended, is in condition for allowance. The Applicants have cancelled claims 5, 10 and 15, without prejudice, and added new claims 20 and 21. By virtue of this amendment, Claims 1-4, 6-9, 11-14, and 16-21 are pending. Reconsideration and allowance of the pending claims in view of the above amendments and the following remarks is respectfully requested.

Election/Restriction

The Examiner has made the restriction requirement of the previous office action final. The Applicants have cancelled claims 5, 10 and 15, without prejudice.

Claim Objections

The Examiner objected to claims 1-4, 6-9 11-14 and 16-19 due to specified informalities in independent claims 1, 6 and 11, from which the remainder of these claims depends. The Applicants have amended independent claims 1, 6 and 11 as recommended by the Examiner to correct the specified informalities. The Applicants therefore assert that this objection has been overcome by these amendments and should be withdrawn.

Rejection under 35 U.S.C. §102(e) as being Anticipated by Miller

The Examiner rejected claims 1-2, 4, 6-7, 9, 11-12, 14 and 16-19 under 35 U.S.C. § 102(3) as being anticipated by *Miller et al.*, U.S. Patent No. 6,014,707, (hereinafter "Miller").

The Applicants have amended independent claims 1, 6 and 11 to more clearly define the presently claimed invention. The amendments to these claims will be described using amended independent method claim 1 as an example.

Amended independent claim 1 has been amended to specify that a “speed indication signal comprises an indicated speed of transmission specifying a maximum transmission rate to be used in transmitting the specified data item from the server to the requesting computer.” Support for this amendment is found in the specification at, for example, page 5, lines 21-26. No new matter has been added by this amendment.

The Applicants have further amended independent claim 1 to recite “transmitting the specified data item from the server to the requesting computer, the transmitting comprising limiting, by the server, an average rate of transmission while sending at least a portion of the specified data item across a data link from the server to the requesting computer to be not greater than the maximum transmission rate represented within the speed indication signal received from the requesting computer, wherein the maximum transmission rate is less than the data rate of the data link and less than the data rate capacity of the requesting computer”. Support for these amendments to claims 1, 6 and 11 is found in the specification at, for example, page 6, lines 7-24. No new matter has been added by this amendment.

The Applicants assert that the cited references fail to teach or suggest, when taken either alone or in any combination, the presently claimed invention when these claims are considered as a whole. To begin, the Miller reference is directed to limiting transmission rate to accommodate network congestion. Miller, Abstract, column 4, lines 25-30. A problem being addressed by Miller is not only total network speed, but also total packet size. See, Miller, column 2, lines 32-41.

The Miller reference fails to teach or suggest a “speed indication signal that comprises an indicated speed of transmission representing a maximum transmission rate to be used in transmitting the specified data item.” Miller teaches a “download start” message that includes a specification of a “block size” and a “delay” that are used to transmit data blocks from a server to a requesting computer. Miller, column 7, lines 4-35, particularly lines 13-14 and 28-29. The “block size” is specified to be a “maximum

PDU (i.e., data block or packet) size” and the “delay is specified to indicate “a minimum delay in microseconds between sending successive data PDUs.” *Id.*

Although a maximum transmission rate used by Miller may be dependent upon “block size” and “delay” values, these values are only limits of two independent parameters. The “block size” parameter is also not a specification of a time period but rather a number of bytes. The time associated with transmitting the block is dependent upon the transmission channel data rate, which is not specified or indicated by the system of Miller.

The indeterminate nature of the time used to transmit a data packet of the specified size in the Miller system causes these two parameters to fail to teach a specific value. The Applicants assert that a teaching of specifying limits for two independent parameters, one of which does not even specify a definite time period, is not a specification of “an indicated speed of transmission” as is set forth for the presently claimed invention. Unlike the presently claimed invention, the problem addressed by Miller is concerned with limiting transmitted packet size and not with limiting the “maximum speed of transmission.”

Since Miller has no teaching of a maximum speed of transmission within the context of the presently claimed invention, the Miller reference fails to teach or suggest “transmitting the specified data item from the server to the requesting computer, the transmitting comprising limiting, by the server, an average rate of transmission while sending at least a portion of the specified data item across a data link from the server to the requesting computer to be not greater than the maximum transmission rate represented within the speed indication signal received from the requesting computer” as is set forth for the presently claimed invention.

With regards to claims 2, 7, and 12 the Applicants have amended these claims to more clearly define this aspect of the present invention. These amendments are represented by amended claim 2, which specifies that the “transmitting” step comprises

“determining, at the server in response to receiving the speed indication signal, a block size based at least on the indicated speed of transmission; [and] determining, at the server in response to receiving the speed indication signal, a period based upon at least on the indicated speed of transmission, wherein the period is longer than the period required to transmit the block size at the data rate of the data link.” Support for the amendments to claims 2, 7 and 12 is found in the specification at, for example, page 5, line 21 through page 6, line 24.

The Miller reference explicitly teaches that the block size and period between blocks, referred to in Miller as a “delay,” is performed by the requesting client. Miller, column 2, line 63 through column 3, line 5. The Applicants assert that the cited references fail to teach or suggest the limitations of claims 2, 7, and 12. Further, the Applicants assert that the apparent analysis used to reject claims 1, 6 and 11 relies on the block size and period to specify the “indicated speed of transmission” and therefore cannot be a basis of “determining” steps that are performed “at the server in response to receiving the speed indication signal.” Therefore, the Applicants assert that the cited references fail to teach or suggest the limitations of claims 2, 7, and 12, particularly when considered “as a whole” in conjunction with the limitations of the independent claims from which they depend.

Additionally, the Applicants point out that the Miller reference only teaches a “delay” that is a time period between data blocks. The presently claimed invention recites “determining ... a period” with each of a plurality of blocks “being transmitted at intervals substantially equal to the period.” The “period” as claimed for the presently claimed invention is not the “delay” of Miller. The “period” of the presently claimed invention corresponds to the “delay” of Miller and the time required to send the data packet with the specified size. The Applicants assert that Miller never discusses the time required to send the data packets. The description of Miller describe a number of bytes in a packet and discusses the time between packets. The Applicants assert that Miller fails to incorporate data transmission rates and therefore cannot determine “a period based at least on the indicated speed of transmission” since the total period as claimed, which

includes the data packet transmission time and the inter packet time, is never discussed by Miller.

The Applicants assert that the teachings of Miller fall short of the requirements for anticipation under 35 U.S.C. §102 with regards to the limitations of amended claims 2, 7 and 12. The Applicants further assert that the limitations of amended claims 2, 7 and 12 are not an inherent teaching of Miller as defined by MPEP §2112(IV), which states:

The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993) (reversed rejection because inherency was based on what would result due to optimization of conditions, not what was necessarily present in the prior art); *In re Oelrich*, 666 F.2d 578, 581-82, 212 USPQ 323, 326 (CCPA 1981). "To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.' " *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) (citations omitted)

MPEP §2112(IV) (emphasis in original).

With regards to claim 19, the Applicants have amended claim 19 to more clearly specify that "the new speed indication signal being received subsequently to the receiving the request and during the transmitting the specified data item" and that the method includes "adjusting, in response to receiving the new speed indication signal, the average rate of transmission while continuing the transmitting the specified data item to be not greater than the new indicated speed contained within the new speed indication signal." Support for these amendments is found in the specification at, for example, page 7, lines 21-26. No new matter has been added.

The Miller reference specifies that changes in transmission parameters, such as the packet size and delay between packets, are sent as rerequests that are unrelated to

previous requests for data. Miller, column 5, line 65 through column 6, line 10. These rerequests are able to be sent after a data transmission is completed or may interrupt a data transmission where an error has been detected. *Id.* The Applicants assert that amended claim 19, which specifies “adjusting, ..., the average rate of transmission while continuing the transmitting the specified data item” is clearly not taught or suggested by the cited references.

Furthermore, the Applicants note that dependent claims 2, 4, 7, 9, 12, 14, and 16-19 depend from amended independent claims 1, 6 and 11, respectively. As discussed above, amended independent claims 1, 6 and 11 distinguish over the cited references. Since dependent claims include all of the limitations of the independent claims from which they depend, Applicants further assert that, at least for the reasons discussed above, dependent claims 2, 4, 7, 9, 12, 14, and 16-19 also distinguish over the cited prior art as well. Therefore, Applicants respectfully assert that the Examiner’s rejection of claims 1, 2, 4, 6, 7, 9, 11, 12, 14, 16-19 under 35 U.S.C. §102(e) as being anticipated by Miller should be withdrawn.

Rejection under 35 U.S.C. §103(a) as being Unpatentable over *Miller*
in view of *Shapiro*

The Examiner rejected claims 3, 8 and 13 under 35 U.S.C. § 103(a) as being unpatentable over Miller in view of *Shapiro et al.*, U.S. Patent No. 5,991,810, (hereinafter “Shapiro”).

The Applicants note that dependent claims 3, 8 and 13 depend from amended independent claims 1, 6 and 11, respectively. As discussed above, amended independent claims 1, 6 and 11 distinguish over the cited references. Since dependent claims include all of the limitations of the independent claims from which they depend, Applicants further assert that, at least for the reasons discussed above, dependent claims 3, 8 and 13 also distinguish over the cited prior art as well. Therefore, Applicants respectfully assert that the Examiner’s rejection of claims 3, 8 and 13 under 35 U.S.C. §103(a) should be withdrawn.

NEW CLAIMS

The Applicants have added new claims 20-21. Support for new claim 20 is found in the specification at, for example, page 4, line 28 through page 5, line 1. Support for new claim 21 is found in the specification at, for example, page 5, lines 6-9. No new matter has been added by these amendments.

CONCLUSION

The foregoing is submitted as full and complete response to the Official Action mailed September 25, 2006, and it is submitted that Claims 1-4, 6-9, 11-14, and 16-21 are in condition for allowance. Reconsideration is requested and allowance of Claims 1-4, 6-9, 11-14, and 16-21 is earnestly solicited.

No amendment made was related to the statutory requirements of patentability unless expressly stated herein. No amendment made was for the purpose of narrowing the scope of any claim, unless Applicants have argued herein that such amendment was made to distinguish over a particular reference or combination of references.

If for any reason the Examiner finds the application other than in condition for allowance, or the Examiner believes that there are any informalities which can be corrected by Examiner's amendment, a telephone call to the undersigned at (561) 989-9811 is respectfully solicited.

In view of the preceding discussion, it is submitted that the claims are in condition for allowance. Reconsideration, re-examination, and allowance of the claims are requested.

Respectfully submitted,

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